



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

ADVISORY GUIDELINES FOR MANAGEMENT REVIEW OF INVESTIGATIVE RESOURCES AND REQUESTS FOR ASSISTANCE OF EXPERTS

To: Program 1 Supervising Attorneys
From: Bill Hooks, Chief Public Defender
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The following are advisory guidelines to help Program 1 supervisors make decisions regarding resource expenditures for investigations and retention of experts. These guidelines are intended to help guide and inform the decisions you and your attorneys make. They are not intended to be taken as mandatory. Decisions in individual cases are subject to the facts and details of the case. Our professional duties and obligations are mandatory.

These advisory guidelines are based on the Montana Public Defender Commission Practice Standards ("Practice Standards") and applicable case law.

I. NATURE OF REPRESENTATION

The Public Defender Commission states that "[t]he paramount obligation of counsel is to provide quality representation and diligent advocacy to the client at all stages of the representation. *Practice Standards, Section III, The Attorney-Client Relationship*.¹

THE DECISION TO ENTER A GUILTY PLEA BELONGS TO THE CLIENT. "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal[.]" Jones v. Barnes, 463 U.S. 745, 751 (1983). The client's authority to decide what plea to enter is recognized in the Montana Rules of Professional Conduct. Rule 1.2(a) requires that "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

We cannot lean on clients to plead guilty, as a response to excessive workloads.

Our Practice Standards make clear that “[t]he decision to enter a plea of guilty rests solely with the client; counsel should not tempt to unduly influence that decision.” *Practice Standards, Section VI, Qualifications and Duties of Counsel*, ¶ 14.

THE DUTY TO CONDUCT AN INVESTIGATION. We have a duty to make reasonable decisions regarding investigations in all cases. This duty exists despite the client’s wish to admit guilt.

The Public Defender Commission advises that “counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the client’s wish to admit guilt, ensure that the charges and disposition are factually and legally correct and that the client is aware of potential defenses to the charges.” *Practice Standards, Section VI, Qualifications and Duties of Counsel*. ¶ 6, *Duty of Counsel to Conduct Investigation*. The scope of the investigation and sources of investigative information are set out in the Practice Standard.²

- A. The Client’s Statements Help Frame the Scope of an Investigation. Counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland v. Washington*, 466 US 6__ (1984); *State v. Prindle*, 2013 MT __, __ Mont. __ 304 P.3d 712, 716-717. The *Prindle* Court held that “[a] defendant’s intent to plead guilty narrows the scope of investigation necessary to be ‘reasonable.’” *Smith v. Mahoney*, 611 F.3d 978, 987 (9th Cir. 2010) (“Smith’s intent to plead guilty mitigated, but did not eliminate, his attorney’s duty to reasonably investigate.”). The pertinent question is, based on the defendant’s particular goals, did counsel “familiarize him- or herself sufficiently with the facts of the defendant’s case to make an informed recommendation regarding a plea bargain.” *Prindle*, __ (citing John M. Burkoff & Nancy M. Burkoff, *Ineffective Assistance of Counsel*, § 6.5 at 238 (West Publ. Co. 2011 ed.)).
- B. The Duty to Investigate May Include a Decision to Obtain Expert Assistance. The PDC recognizes that the duty to investigate, as articulated in Practice Standard Section VI, ¶ 6, may include a request for expert assistance where

necessary or appropriate to the preparation of the defense; an adequate understanding of the prosecution's case; or, to rebut the prosecution's case."³

- C. Counsel's Duties Continue Through the Sentencing Stage. Our representational duties, including the duties to make reasonable decisions about investigations and to seek the assistance of experts when appropriate, continue through the sentencing stage. Practice Standards, Section VI, ¶ 23(A)(f), lists counsel's obligations at sentencing, and includes the obligation "to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever warranted and possible."⁴

II. GUIDELINES FOR CONSIDERATION OF REQUESTS FOR EXPERT ASSISTANCE

Consideration of requests for approval to retain expert assistance may be guided by non-exclusive, advisory guidelines and considerations.

- A. The Perceived Guilt or Innocence of the Accused. Program 1 *does not* allocate resources to clients whom we perceive to be innocent, and deny resources to those clients whom we perceive to be guilty.

First, it would amount to a violation of constitutional rights. All clients have the right to effective representation, regardless of one's perception of their guilt or innocence. The constitutional guarantee of effective representation is a guarantee of "effective representation of all defendants, regardless of guilt or innocence." Miranda v. Clark County, 319 F.3d 465, 470 (9th Cir. 2003), citing Gideon v. Wainwright, 372 U.S. 335, 244 (1963).

Second, it could create liability in a federal civil lawsuit. In Miranda v. Clark County, the 9th Circuit Court of Appeals, en banc, held that the head of a public defender agency may be liable under 42 USC § 1983 for "a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt". There, an exonerated former client sued under § 1983, alleging "deliberate indifference" to his Sixth Amendment rights, as it had been the policy of the office at the time to allocate

resources and attorneys to defendants based on the results of polygraph exams. Those clients who did well on the exams received more resources for their defense; those who did poorly on the polygraph exams were not given the same level of resources.

- B. State's Use of Experts. The prosecution's use of expert assistance may be a significant factor in determining whether to seek expert assistance, and the type of assistance necessary to respond to the state's case.

However, the prosecutor's use of an expert does not automatically require the assistance of experts for the defense. Effective representation does not require that we challenge every aspect of the state's case. For example, homicide cases generally require testimony from an expert to establish the cause of death. If the cause of death is not disputed, and the defense asserts an alibi or relies on mistaken identity, we would not need an expert on the cause of death.

- C. Availability of a Neutral Expert. We cannot rely on "neutral" experts when the case requires the assistance of expert assistance to further the client's interests. "[E]valuation by a 'neutral' court psychiatrist does not satisfy due process." Smith v. McCormick, 914 F.2d 1153, 1158 (9th Cir. 1990).
- D. Absence of an Expert for the State. The absence of expert assistance or involvement on the prosecutor's side should not automatically preclude the use of a defense expert. Consideration of affirmative defenses may require expert assistance. Mental health evaluations, sexual offender evaluations, and other types of expert assistance often are appropriate even in the absence of a state's expert.
- E. Nature of scientific evidence at issue. Is the scientific evidence at issue or the empirical basis of the results subject to challenge? Does it appear to be routine? Is the state's expert analysis valid?

Routine Tests. In routine cases, there may be no need for a defense expert. We usually don't need to challenge the state's evidence regarding toxicology results or drug identification.

Subjective Tests. Tests that are based on a comparison of features can be based on subjective methods that leave the results open to challenge. In this type of comparative procedure an examiner seeks to determine whether an evidentiary sample, such as DNA, hair, fingerprints, bite marks, tool marks, bullets, or tire tracks, is or is not associated with a source sample, such as biological material or an item (a gun, a tool, a shoe) associated with the suspect. The comparison for similar features may be subjective, in that the examiner relies on judgment about which features to select or how to determine whether the features are sufficiently similar to be called a proposed identification.⁵ Access to expert assistance may be necessary to challenge subjective tests and the interpretation of the results.

F. Admissibility. If a defense expert will be called to testify, is the testimony to be proffered admissible?⁶

In addition to these considerations, the following non-exclusive factors can be used to consider the adequacy of the information provided in a request for approval of funds.

G. Specificity. The request should be reasonably specific as to the type of assistance requested. A speculative, shot-in-the-dark request generally should be rejected or at least warrant further discussion. At times, an attorney may need an expert to help determine if there is a valid scientific or forensic evidentiary issue worth pursuing. A request for expert assistance to conduct a preliminary assessment and offer an opinion should be based on a good faith representation that the assessment is likely to be productive.

H. Role of Expert. Is the expert needed as an advisor pretrial and/or during trial, or is the expert needed as a testifying expert?

I. Costs. Are the anticipated costs reasonable, and related to the services to be provided? Is the requested amount specific or open-ended?

J. Qualifications. Is the expert qualified in the particular field?

¹ The Practice Standard further defines our obligations as follows:

A. To provide quality representation and diligent advocacy, counsel must preserve, protect, and promote the client's rights and interests, and be loyal to the client.

B. Public defenders, contract counsel, shall provide services to all clients in a professional, skilled manner consistent with the Montana Rules of Professional Conduct, case law, applicable court rules defining the duties of counsel and the rights of their clients, and these Standards."

² The ABA *Standards for Criminal Justice: Prosecution and Defense Function*, 4th ed. (2015), Standard 4-4.1, similarly requires an investigation, even if the state's case appears strong or the accused expresses a desire to plead guilty.

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

³ Practice Standard VI, ¶ 6 provides, in relevant part:

B. Sources of investigative information and relevant procedures may include the following:

g. Securing the assistance of experts. Counsel should secure the assistance of experts where it is necessary or appropriate to:

- i. the preparation of the defense;
- ii. adequate understanding of the prosecution's case; or
- iii. rebut the prosecution's case.

⁴ Practice Standard VI, ¶ 23 provides, in relevant part:

A. Among counsel's obligations in the sentencing process are the following:

- a. where a client chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, financial, and collateral implications;

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- b. to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
 - c. to ensure all reasonably available mitigating and favorable information which is likely to benefit the client is presented to the court;
 - d. to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
 - e. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful, or is otherwise improper, is stricken from the text of the pre-sentence investigation report before distribution of the report; and,
 - f. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever warranted and possible.

⁵ See, President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016).

⁶ See, Rule 701-705, M.R.Evid.; State v. Cline, 225 Mont. 46, 909 P.2d 1171 (1996); McClue v. Safeco Ins. Co., 2015 MT ___, ___ Mont. ___, 354 P.3d 614; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).